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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,
v.
LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

AMICUS CURIAE BRIEF

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

United States Steel Corporation respectfully moves for leave to file a brief *amicus curiae*. Appellants have consented to the filing of such a brief. Appellee has not.

United States Steel Corporation had no knowledge of the existence of this litigation until the three-Judge panel's decision was reported in various newspapers. On April 28, 1976, it filed a motion to intervene in the United States District Court which was denied on May 26, 1976 on the grounds that United States Steel Corporation had adequate notification about the case from the newspapers and on the grounds that the district court lacked jurisdiction to entertain the motion since an appeal had been taken. A similar motion to intervene was filed before this court but was denied on October 4, 1976. Therefore, a brief *amicus curiae* is the only way United States Steel Corporation now can be heard.

The order of the three-Judge panel in this case requires the Ohio Bureau of Employment Services to pay unemployment compensation benefits to plaintiff Hodory, an employee of United States Steel Corporation, and several hundred other of its employees as the members of a class.

United States Steel Corporation, a Delaware Corporation with about 17,000 employees located in Ohio, is subject to and is in full compliance with the Ohio Unemployment Compensation Act.

Under the provisions of the Ohio Unemployment Compensation Act which establishes a merit rating system for the payment of contributions by Ohio employers, United States Steel Corporation in effect will pay the benefits ordered to be paid—approximately $316,000. See Section 4141.25 of the Revised Code of Ohio.

Further, under Ohio law, United States Steel Corporation is an interested party. It is entitled to notice of proceedings before the state unemployment compensation agency which involve its employees and the potential charges against it for payment of benefits to such employees. It has certain appeal rights which it exercised on the claims at issue here which were allowed by the Ohio agency. See Sections 4141.01(I) and 4141.28 of the Revised Code of Ohio. These appeals are still pending before the Ohio Board of Review awaiting the final order in this case before being processed further. Also, there are other claims by employees of United States Steel Corporation which were denied by the Ohio agency and which also would be affected by the order of the three-Judge panel in the event it becomes final.

The proprietary interest of United States Steel Corporation in the Ohio unemployment compensation fund is substantial and it should be heard in this case. See *Carnegie-Illinois Steel Corporation v. Review Board,* 117 Ind. App. 379, 72 N.E. 2d 662 (1947). Carnegie-Illinois Steel Corporation is now a part of United States Steel Corporation.

The interests of United States Steel Corporation are not adequately represented by the appellants. The interests of the appellants are to see that the laws of the State of Ohio are enforced. They have no particular interest in whether or not the employees of United States Steel Corporation receive benefits. *Trbovich v. United Mine Workers,* 404 N.S. 528, 538-9 (1972), has established the principle that a governmental agency cannot adequately represent the interest of a private party. It is only by coincidence that the appellants are to be considered generally on the same side of the issues herein as United States Steel Corporation.

Accordingly, we respectfully request that the Court grant United States Steel Corporation's motion for leave to file the brief *amicus curiae* which is attached hereto.

.....

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OPINION AND ORDER BELOW

The three-judge Court's Memorandum Opinion and Order issued March 4, 1976, which were issued without notice to United States Steel Corporation, is attached hereto. [See Appendix] It is printed at 408 F.Supp. 1016 (N.D. Ohio, 1976).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under 28 U.S.C. §1253 which provides for direct appeal to this Court from an order of a three-judge District Court granting or denying an interlocutory or permanent injunction.

STATUTE INVOLVED

Section 4141.29 (D) (1) (a) of the Revised Code of Ohio read as follows at the time this action arose:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged

in the dispute, or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

Section 1 of The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS FOR REVIEW

1. Did the court below err in finding that Ohio Revised Code §4141.29(D)(1)(a) violates the Equal Protection Clause of the Fourteenth Amendment?

2. Did the court below err in finding that Ohio Revised Code §4141.29(D)(1)(a) violated the Due Process Clause of the Fourteenth Amendment?

HISTORY OF THE CASE

This is an action by Leonard Paul Hodory against the Ohio Bureau of Employment Services, for its refusal to pay unemployment compensation benefits to him. Plaintiff (Appellee herein) Hodory became unemployed from the United States Steel Corporation, Ohio Works, on November 12, 1974 because of a nation-wide strike by the United Mine Workers affecting, in Ohio, U. S. Steel and the Republic Steel Corporation. Plaintiff applied for unemployment compensation benefits the following day and was later notified by the Ohio Bureau of Employment Services that he was ineligible for benefits because he was unemployed as a result of a labor dispute involving his employer. ORC 4141.29(D)(1)(a)

Plaintiff brought this action in federal court pursuant to 42 U.S.C. §1983 seeking (1) an injunction against the enforcement of the statute, (2) a declaration that it was unconstitutional, and (3) past benefits for himself and the class he purported to represent, viz, 1250 other U. S. Steel or Republic Steelworkers, unemployed in Ohio because of the United Mine Workers strike against those two companies.

The three-judge district court,

(1) granted class certification

(2) enjoined enforcement of the statute

(3) held the labor dispute provisions unconstitutional

(4) ordered the defendant Ohio Bureau of Employment Services to pay unemployment compensation benefits to those denied benefits solely because of ORC 4141.29(D)(1)(a).

The defendant appealed to the Supreme Court of the United States.

ARGUMENT

I. Judicial and Administrative Precedent Indicate That the Court Erred in Deciding That the Ohio Labor Dispute Provision Violated the Fourteenth Amendment Because It Disqualified From Unemployment Compensation Individuals Who Were Not Voluntary Participants in a Labor Dispute.

Since the beginning of the unemployment compensation program of the United States, approximately forty years ago, there has been very little dispute concerning the power of a state to adopt a strike disqualification provision which had the effect of denying unemployment compensation to individuals who were not voluntary participants in a labor dispute which caused their unemployment. As will be noted herein, that power has been tested in this Court but never successfully. The decision of the Court below is a substantial departure from established law and it has opened many questions such as how far a Federal district court may go in deciding issues in state unemployment compensation cases before that state's courts have had an opportunity to act on the facts of the case; how far a Federal district court may go in requiring an employer to pay into a fund from which benefits are paid to those of its employees who lose work because of a labor dispute in which their employer is involved; how far a Federal district court may go in deciding issues in an unemployment compensation case without notice to the employer to whom benefits will be charged; and what a state *cannot* do to protect its fund from large and sudden withdrawals unrelated to fluctuations in business condition.

A. THE CARMICHAEL AND CHAMBERLIN CASES.

This Court has already approved a labor dispute disqualification which disqualified from unemployment compensation individuals who were unemployed as a result of a labor dispute in which they were not voluntary participants. See *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 57 S.Ct. 868, 81 L. Ed. 1245 (1937), *Chamberlin v. Andrews,* 299 U.S. 515, 81 L. Ed. 380, 57 S.Ct. 122 (1936).

The Alabama unemployment compensation statute (General Statutes of Alabama, 1935, No. 447, enacted September 14, 1935) involved in *Carmichael, supra,* provided: "Section 6. Benefit Eligibility Conditions * * * (d) during trade disputes, an employee shall not be eligible for benefits in any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was employed." *There was no exception.* Obviously, this statute disqualified individuals whether or not they were voluntary participants in such dispute or innocent bystanders whose employment was interrupted by the occurrence of the labor dispute. The constitutionality of this statute was upheld in *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 81 L. Ed. 1245, 57 S.Ct. 868 (1937). In that case, there was a long opinion by Justice Stone in which he discussed the merits of the statute and of the attacks on it. The opinion deals definitely with the validity of the classifications and exemptions contained in the statute and holds that they were reasonable. The court said,

> "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny, *they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. . . .*" (Emphasis added) (at 509)
>
> "What we have said as to the validity of the choice of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. . . ." (at 513)

The New York statute involved in *Chamberlin* said: (*Laws of New York,* 1935, Vol. 1, p. 1033, Sec. 504) "Waiting Period. (1)" (This provided a waiting period for everyone of three weeks) beginning "(2) An employee shall not be entitled to benefits except for unemployment which continues subsequent to a waiting period of ten weeks . . .(b) if he has lost his employment because of a strike, lockout, or industrial controversy in the establishment in which he is employed." *There was no exception* for employees whose unemployment resulted from a labor dispute but who were not voluntary participants in such dispute. Again, the constitutionality of this statute was upheld in *Chamberlin v. Andrews,* 299 U.S. 515, 81 L.Ed. 380, 57 S.Ct. 122. (1936)

B. THE ABERNATHY CASE.

Denial of unemployment compensation to employees not voluntarily participating in a labor dispute was specifically upheld *In re J. K. Abernathy,* 259 N.C. 190, 130 S.E. 2d 292 (1963), cert. denied 375 U.S. 181 (1963), which is directly identical to the case now before the Court in several respects. The North Carolina statute

involved in that case was Section 96-14(4) of the General Statute of North Carolina, 1963. It read as follows:

> "An individual shall be disqualified for benefits:
>
> (4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed . . . ."

We quote again from the Ohio statute to show its similarity to the North Carolina statute:

> ". . . no individual may serve a waiting period or be paid benefits under the following condition:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemployment was due to a labor dispute . . . at any factory, establishment or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed and for so long as his unemployment is due to such labor dispute. . . ."

It is clear that in both *In re J. K. Abernathy* and the case now before this Court that:

(a) the state statute disqualified claimants not on strike who lost their employment because of a strike in another state by a union to which they did not belong, and

(b) the disqualification disqualified individuals otherwise eligible and qualified who were *involuntarily* unemployed due to a labor dispute.

The North Carolina labor dispute provision was attacked as violating the equal protection clause of the Fourteenth Amendment.

The Supreme Court of North Carolina upheld the constitutionality of the North Carolina statute. It directed much of its opinion to the purpose of unemployment compensation and its early history, both in England and in the United States, to show that the fundamental purpose of the labor dispute disqualification in the state laws is twofold: (1) to maintain a state's neutrality in labor management relations and (2) to prevent severe drains upon the insurance fund. The court quoted with approval from the Nebraska Law Review, Vol. 37, No. 4 of June, 1958 as follows:

> "Because there had been no previous experience [in England] it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating *the primary purpose for* which *the fund* was created—the *payment of benefits when unemployment was due to 'fluctuations in trade.'*" [Underscoring supplied]

See *Huges, Principles Underlying Labor Dispute Disqualification,* 1946.

In discussing the constitutionality of the North Carolina labor dispute provision, the North Carolina court pointed out that the unemployment compensation laws of most states contained a labor dispute disqualification of some nature and ruled that the broader disqualification contained in the North Carolina statute ". . . involves a question of degree and not of principle." (Appendix, p. 53) It then went on to uphold the constitutionality of the statute, stating " 'When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts' judgment but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome.' *Sproles v. Binford,* 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167 . . . ." (1932) (Appendix, pp. 52-53)

C. Legislative and Administrative Precedent.

The Social Security Act (Act of August 14, 1935, ch. 531, 49 Stat. 620, as amended, 42 U.S.C. § 301 et seq., 1970) established a system administered on a state-by-state basis with some federal financing from the collection of an excise tax on employers. The states were permitted to collect an additional tax from employers whose employees collected more than a given amount of benefits. To assist the states in drafting legislation to implement the unemployment compensation system, the Social Security Board, which was created as a general advisory council on social security, composed several model bills. The bills were based in large part on the British experience in administering unemployment insurance. See Shadur, "Unemployment Benefits and the Labor Dispute Disqualification," 17 U. Chi. L. Rev. 294, 294-95 (1950). The model bill adopted in most states contained

a provision which served to disqualify workers whose unemployment was "due to a stoppage of work which exists because of a labor dispute." The bill provided, in part:

> An individual shall be disqualified for benefits . . . for any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown to the satisfaction of the commissioner that—
>
> (1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> (2) He does not belong to a grade or class of workers of which, immediately before commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;
>
> Provided, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises. (Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types § 1(5) (1936).)

The advice of the Social Security Board was not followed by all the states. Many states followed the lead of Wisconsin which had enacted the Wisconsin Employment Reserves Act of 1932, before enactment of the Federal law. That Wisconsin Act disqualified in the following way:

> "An employee who left (. . . or lost) his employment with an employer because of a strike or other bona fide labor dispute is not eligible for benefits . . . for any week in which the strike or labor dispute is in active progress. . . ."

Employees who lost work regardless of fault, and regardless of their lack of interest in the labor dispute were disqualified in Wisconsin and also in those states which patterned their strike disqualification after that of Wisconsin. Some states borrowed labor dispute disqualification language from Wisconsin and at the same time borrowed some of the language of the Social Security Administration. It is impossible to classify all the state labor dispute disqualifications and say that any two are identical. However, all of them including the North Carolina statute involved in *Abernathy, supra,* and the Ohio statute involved in the instant case were approved by the Social Security Board as conforming to the requirements of the Social Security Act.

In summary, then, labor dispute disqualification provisions which violated the "fault" principle have been approved by this Court and by the Social Security Board and a labor dispute disqualification provision identical with the instant one was specifically upheld by the North Carolina Supreme Court in face of a constitutional attack. The decision of the lower court, which ignored the above precedents, is clearly erroneous and should be reversed.

II. The Ohio Labor Dispute Provision Does Not Violate the Equal Protection Clause of the Fourteenth Amendment, Because It Makes a Permissible Classification That Is Justified by a Legitimate State Interest.

The State of Ohio has a legitimate governmental interest in making the distinction between those unemployed because of a labor dispute although they themselves are not involved, and those unemployed because of general lack of work not brought about by labor disputes.

A. Financial Basis For Classification.

The first and most obvious governmental interest served by ORS 4141.29(D)(1)(a) is protection of the fiscal integrity of the state unemployment compensation fund. See Pribram, "Compensation for Unemployment during Industrial Disputes," 51 Monthly Lab. Rev. 1375, 1376 (1940). In the *Abernathy* case, for example, the number of possible unemployment compensation claimants and accordingly, the potential drain on the state fund, was enormous—$1 million per week. In the instant case, the unemployment compensation benefits claimed by the plaintiff class amounted to approximately $316,000.00. Ohio sought to protect its unemployment compensation fund from certain large and sudden withdrawals by enacting the statute which the lower court here has declared unconstitutional. This Ohio statute, together with other provisions of the Ohio unemployment compensation law less generous than similar provisions of other states, has enabled Ohio to maintain a solvent fund during recent periods of high unemployment. Ohio's balance in its unemployment compensation

fund was $295,520,688.75 as of December 31, 1975. Those other states and jurisdictions which followed a more generous policy of benefit payments and were forced to borrow from the federal government numbered twenty-one as of October 15, 1976 and the total amount of their borrowings as of October 15, 1976 was $3,208,032,-294.52. Approximately $2.9 billion of this amount has been borrowed from Federal general revenue funds. (United States Department of Labor, Unemployment Insurance Service, Employment and Training Administration.) Clearly, the interest of the state in preserving the fiscal integrity of the fund justifies the classification created by this labor dispute disqualification provision.

B. Labor Policy Basis for Classification.

A second legitimate governmental interest served by ORS 4141.29(D)(1)(a) is the preservation of a governmental neutrality in a labor dispute. It is clear that any governmental action which increases or decreases the cost of a labor dispute to one side or the other affects the bargaining position of both parties and the ultimate outcome of the labor dispute. See J. T. Carney, "The Forgotten Man on the Welfare Roll: A Study of Public Subsidies for Strikers," 1973 Washington L.Q. 469, 527-534 (1973).

Obviously, payment of unemployment compensation to strikers decreases the cost to them of their participation in the strike while at the same time increasing the employer's cost of resisting the strike, since the employer will ultimately be charged by the state with the costs of such benefits. Payment of unemployment compensation to employees laid off by reason of the strike but not participating therein does not decrease the cost

of the strike to the participants but it does increase the cost of resisting the strike to the employer and thereby affects the bargaining power of the employer and the ultimate outcome of the strike. Now, one of the three bases for the normal strike disqualification (which is directed more at the first situation than the second)—is the "neutrality" principle—the principle that the state should not intervene in a labor dispute to assist either party gain its economic ends. See Carney, supra, 497. It is clear that the neutrality principle is better served by the broad based labor dispute disqualification contained in the Ohio statute than by the more usual labor dispute disqualification contained in some other state unemployment compensation laws since the Ohio labor dispute disqualification precludes the imposition of any financial penalty on an employer who is forced to lay off workers because others of the employer's employees are engaged in a labor dispute. The state's interest in remaining neutral in labor disputes justifies the classification contained in the Ohio unemployment compensation law.

It is clear that Ohio has a right to enact legislation to protect those legitimate interests. See *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970) where the Supreme Court upheld a provision of a Maryland Aid to Families with Dependent Children Act, which put a ceiling of $250 per month on welfare benefits no matter how many children were in the family. Since the statute provided for an additional monthly benefit for each child until the $250 level per month was reached, the plaintiffs in that case claimed a denial of equal protection by this classification. The court held the Maryland provision did not violate the equal protection clause of the Fourteenth Amendment, because the states are al-

lowed considerable latitude in putting into effect their welfare legislation. The Court there said, "In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classification made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution merely because the classification is not made with mathematical nicety or because in practice it results in some inequality." (at 485) (citations omitted) The Court went on to say that the federal courts have no power to impose their view of wise social policy upon the states under the Fourteenth Amendment, and that the deference given the state in this situation is such that if any reasonable set of circumstances could be conceived to warrant the classification, then it will not be set aside. Here, the *Abernathy* circumstances are those which would immediately warrant the distinction made by the State of Ohio. ORS 4141.29(D)(1)(a) is a legitimate attempt by the state to avoid placing a burden on the struck employers, and to prevent its own unemployment compensation fund from being depleted by labor disputes. In striking down the classification on equal protection grounds, the Court below sought to implement its own preconceived notions of social policy, ignoring completely the admonitions of this Court in *Dandridge*. "The entractable social, economic and even philosophical problems presented by public welfare assistance programs are not the business of the court . . . the Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." (at 487) Accordingly, the decision of the court below should be reversed.

III. The Ohio Labor Dispute Provision Does Not Violate the Due Process Clause of the Fourteenth Amendment.

One of the grounds on which the three-judge district court invalidated the Ohio statute was that it violated the due process clause of the Fourteenth Amendment by disqualifying from unemployment compensation benefits employees who were unemployed through no fault of their own, and who never participated or benefited from the labor dispute between their employer and other employees. The court ruled that the state had no interest in denying unemployment compensation to such employees who were laid off through no "fault" of their own. As has been pointed out before, the State has legitimate interests in disqualifying the plaintiff and his fellow class members from receiving unemployment compensation. It is also clear that the "fault" concept is not required by the due process clause. The Ohio statute is not alone in denying unemployment compensation benefits to those laid off through no fault or participation of their own. All states put limits on the number of weeks one may receive unemployment compensation benefits, although no fault is attributed to recipients. The legislation of such states simply decided that there should be a limit on the number of weeks one may receive unemployment compensation benefits, no matter what one's status at the end of that period. Similarly, many states have labor dispute provisions which violate the "fault" principle invoked by the court below. In New York State and Rhode Island unemployment compensation benefits are denied for seven weeks to anyone who is unemployed by reason of a labor dispute. New York Labor Law Section 592, Rhode Island

General Laws, An. 28-44, 46 (1967). After the expiration of the seven-week period, all employees, including strikers, receive unemployment compensation benefits, even if they were financing or had an interest in the dispute. The New York and Rhode Island provision denying benefits to all unemployed by reason of a labor dispute for seven weeks clearly violates the fault principle. (At one time, the New York type provision was included in the unemployment compensation laws of Alaska, Louisiana, Tennessee, and Pennsylvania. See Carney, *supra,* 498.)

Indeed, even the more traditional labor dispute disqualification provision based on the model act's suggested language can result in vicarious disqualification in contravention of the "fault" principle. Thus an employee who is laid off as a result of a labor dispute in which he is interested or which he may be financing (through the payment of union dues) may be disqualified from unemployment compensation even though it would be difficult to say that his unemployment is due to some "fault" or "action" on his part. It is even questionable if disqualification of all participants in a labor dispute is consistent with the "fault" principle. Many individuals who engage in a strike or who honor a picket line do not do so of their own free choice. They may be reluctant strikers who are not permitted to work by their employers who could not operate when a majority of employees are on strike or who dare not return to work during the strike because of fear of violence from their fellows or fines from the union for crossing a picket line. Strict adherence to the "fault" principle would require the unemployment compensation authorities to poll all those involved in a labor dispute to determine whether or not they were voluntary participants in the same so

the unemployment compensation could then be paid to the unwilling but not the willing.

Under the Ohio law as amended, effective December 2, 1975, allowing for the payment of benefits to certain claimants not participating in and not interested in the labor dispute, it is clear that in a factory where members of several unions are employed and one union of four boilerhouse workers, for example, shuts down the entire plant, those members of the other unions who lose their work are disqualified. Although the three-judge opinion below speaks approvingly of the new Ohio law, the principles of the *Hodory* opinion would invalidate the new Ohio labor dispute disqualification because it denies benefits to some who are *involuntarily* unemployed. It would appear from Footnote 5 (Appendix, p. 35) that the three-judge panel was unaware that individuals *involuntarily* unemployed would be denied benefits under Ohio's labor dispute provision as amended effective December 2, 1975.

The thrust of the reasoning in the opinion of the three-judge Court is that the claimants in a labor dispute situation are entitled to benefits if they can show that they are unemployed without "some fault of their own" as is specified in the voluntary leaving, refusal to work and other disqualifications. If such

> "contention finally prevails, there will be, in effect, no labor dispute disqualification at all since all determinations in such situations can be made under other clauses without reference to the labor dispute provision." *Hughes, Principles Underlying Labor Dispute Disqualification,* p. 5.

It should be clear, therefore, that being unemployed involuntarily is not the only test for the payment of

benefits to those otherwise eligible and qualified. There are instances where other considerations become controlling as when a state decides what it must do in order to protect its fund or to maintain its neutrality in the case of labor dispute situations.

In ruling that the Ohio labor dispute disqualification violated the due process clause of the Fourteenth Amendment, the court below dredged from the dank and dark dungeon of the "1930's" the hoary ghost of "substantive" due process—a concept which was used then and is used by the court below to write its own concept of social policy into law. It is clear that the key to the opinion of the court below in this case is the conviction of the individual members of that court that it is unfair to deny unemployment compensation to the plaintiffs in the instant case. One can agree or disagree with the sentiments of the individual judges of the court below but one must remember that they are judges—not elected legislators—. It is the responsibility of the legislature and not the courts to determine what is fair in a substantive sense. As this court declared in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1937), "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought . . . For protection against abuses by legislatures, the people must resort to the polls, not the courts." The decision of the court below violated this principle and should be reversed.

CONCLUSION

It is submitted that Section 4141.29(D)(1)(a) of the Revised Code of Ohio is not repugnant to any law of the United States and that it meets all of the requirements of the Fourteenth Amendment of the United States Constitution.

It is further submitted that the legislature of Ohio in enacting that disqualification acted reasonably and within the police powers vested in it.

For the reasons set forth in this brief, and pursuant to the cases previously decided by this Court, United States Steel Corporation submits respectfully that the decision of the three-judge District Court in this case be reversed.

Respectfully submitted,

FRANK C. MANAK
Counsel for U.S. Steel Corporation

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff
v.
OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants
} No. C 75-15 Y

Memorandum Opinion and Order

CELEBREZZE, *Circuit Judge*
LAMBROS, *District Judge*
KRUPANSKY, *District Judge*

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-captioned action, pursuant to 42 U.S.C. §1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in §4141.29(D)(1)(a) of the Ohio Revised Code.

Hodory challenged the constitutionality of §4141.29 (D)(1)(a) on the grounds that: the provision is in conflict with §303(a)(1) of the Federal Social Security Act, 42 U.S.C. §503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the 14th

Amendment to the United States Constitution; and the overbroad disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing §4141.29(D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U. S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of Employment Services (Employment Bureau) that his claim was disallowed, pursuant to §4141.29(D)(1)(a) O.R.C.

Section 4141.29(D)(1)(a) provides, in pertinent part:

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
(1) for any week with respect to which the administrator finds that:

(a) *His unemployment was due to a labor dispute* other than a lockout *at any factory, establishment, or other premises* located in this or any other state and *owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute* . . . (Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in §4141.29(D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal

is still pending. It is being considered along with the appeals of the approximately 1250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit §4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am.Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. CONCLUSION OF LAW

A. *Availability of Relief in this Court*

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative proceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. §2283, the Anti-injunction statute. *Mitchum v. Foster,* 407 U.S. 225 (1972); *Gibson v. Berryhill,* 411 U.S. 564 (1973). The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger v. Harris,* 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson v. Berryhill, supra,* 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson,* the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. §1983. Moreover, in the instant action, exhaustion of the available ad-

ministrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in this case. Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1250 United Steelworkers, who were similarly effected by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of §4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plaintiff's failure to exhaust his ad-

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1. In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes v. Board of Review,* Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that §4141.29(D)(1)(a) does not create an unconstitutional classification in violation of the Equal Protection clause of the 14th Amendment. *Cornell v. Bailey,* 163 Ohio St. 50 (1955); *Continental Can Company, Inc. v. Donahue,* 5 Ohio St. 2nd 224 (1966). In *Cornell v. Bailey,* the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

ministrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger v. Harris, supra,* and the Court's subsequent decision in *Huffman v. Pursue,* 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. §1983 in which a party was challenging state administrative action in federal court. *Supra,* n.21.

Finally, this Court concludes that absention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by a limiting construction in the state courts. *Daniels v. Waters,* ..... F.2d ..... (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay v. Board of Registration Commissioners,* 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under §4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be

entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. *Class Certification*

Plaintiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of §4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in §4141.29(D)(1)(a), despite the fact that they may have been qualified

in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2)[3]. In light of the fact that the class is certified as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes that notice prior to the determination of the claims herein is not required.

C. *Constitutional Validity of §4141.29(D)(1)(a)*

Plaintiff has challenged the constitutionality of §4141.29(D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as

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2. At the hearing, plaintiff stated that the claims of some 6100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

3. The fact that plaintiff seeks the award of past unemployment benefits does not effect the certification of this class as a Rule 23(b)(2) class. The monetary relief is essentially in the nature of equitable relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez v. U.S. Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973); *see also, Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶23.40.

guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. §1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislature pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In §4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of §4141.29(d)(1) reflect that an individual may not receive benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work to become married or because of marital, parental, filial or other domestic obligations, or became unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those per-

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4. The statute was previously held constitutional in the case of *Lasko v. Garnes,* No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy, was the basis of the challenge.

sons who fall within the labor dispute disqualification found in §4141.29(D)(1)(a).[5]

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of §4141.29(D)(1)(a) were that:

> 1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;
>
> 2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. If the financial burden of supporting its striking union members is shifted from the unions' treasury to the State of Ohio, it's conceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;

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5. Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—is demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect the status of plaintiff and the class for the period during which they were denied benefits pursuant to §4141.29(D)(1)(a).

> 3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U.S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect his employer's financial ability to continue to employ him. The fact that the plaintiff and the 1250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed *union members* per se, but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is

involved in a labor dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the *Steelworkers* would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiations with the *coal miners' union*. Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by §4141.29(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. §1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of §4141.29(D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also violates plaintiffs' right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. §1983.

Since the Court has declared the application of §4141.29(D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. *Relief*

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, §4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce §4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of §4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

THOMAS D. LAMBROS
District Judge

ROBERT B. KRUPANSKY
District Judge

DATED: March 4, 1976

Judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff
v.
OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants
No. C 75-15 Y

CELEBREZZE, *Circuit Judge*
LAMBROS, *District Judge*
KRUPANSKY, *District Judge*

Judgment

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code §4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of §4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

THOMAS D. LAMBROS
District Judge

ROBERT B. KRUPANSKY
District Judge

DATED: March 4, 1976

Appeal.

IN THE
SUPREME COURT OF NORTH CAROLINA
SPRING TERM, 1963

In the Matter of:
J. K. ABERNATHY
SS No. 244-42-7854
Employee, et al
EASTERN AIR LINES, INCORPORATED
EMPLOYER
and
EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA
No. 233—
From
Mecklenburg

Appeal

Appeal by the Employment Security Commission of North Carolina from Riddle, S. J., October, 1962 Special "B" Term, Mecklenburg Superior Court.

This proceeding was instituted before the Employment Security Commission of North Carolina, hereafter called the Commission, by J. K. Abernathy and others, employees of Eastern Air Lines, Inc. (hereafter called Eastern), who filed claims for unemployment insurance benefits during the time they were out of work or furloughed from their jobs as a result of a labor dispute between the flight engineers and Eastern. In due course the Chairman of the Commission ordered the claims referred to R. B. Overton, Special Appeals Deputy, for hearing and disposition. After due notice, the interested parties appeared before Mr. Overton on July 12, 1962. After concluding the hearing on July 18, 1962, the Ap-

peals Commissioner made detailed findings of fact, stated conclusions of law, and ordered that "all those individuals whose names appear on 'Exhibit A' shall be and the same are disqualified from receiving unemployment insurance benefits beginning June 23, 1962, through July 12, 1962, and continuing as long as the labor dispute between Eastern Air Lines, Inc., and the flight engineers remain in active progress and their unemployment is caused thereby."

The parties adversely affected by the finding, conclusion, and order of the Special Appeals Deputy, including the director, Unemployment Insurance Division, petitioned for and were granted a review by the full Commission. Hearing on review by the Commission began on August 10, 1962. At the conclusion of the hearing the Commission (among other things not deemed essential to the dispute) made these findings:

"1. Eastern Air Lines, Inc., hereinafter referred to as the employer, is a corporation engaged in the business of commercial air transportation, transporting passengers, U. S. mail, and cargo in interstate commerce by means of airplanes serving twenty-six states in the eastern half of the United States and one hundred and twenty cities, and in addition thereto, serving Mexico City, Puerto Rico, Bermuda and Canada.

"2. The employer normally employs seventeen thousand nine hundred and six employees throughout its system with between six hundred and fifty and seven hundred being based in North Carolina working at or out of the airports and/or cities served in this State.

"3. The classification of the employees utilized by the employer consists of various skills and vocations, among which are mechanics and related skills, pilots, stewards, stewardesses, flight engineers, communication workers, dispatchers, and various clerical workers, and others, including some non-union personnel.

"4. The employees of Eastern Air Lines, Inc. are represented through its system by the following unions or associations according to their skills and vocations: (1) International Association of Machinists; (2) Airline Pilots Association; (3) Airline Stewards and Stewardesses Association; (4) Flight Engineers International Association; (5) Communication Workers of America Union; and (6) Airline Dispatchers Association. Such unions or associations have been duly certified under the Federal Statutes as the bargaining agents for their members and all other personnel performing similar or related duties, and such bargaining is on a system-wide basis.

"5. In its system the employer employs five hundred and seventy-five flight engineers whose services are utilized on four-engine aircraft throughout its system. Some of such four-engine aircraft land and take off with passengers and cargo at all airports in the system located in North Carolina; namely, Charlotte, Raleigh-Durham and Greensboro-High Point, taking on passengers and cargo at each airport as the necessity arises. Jet planes belonging to the employer also land and take off from the airport in Charlotte taking passengers and cargo to and from that airport as the necessity arises. Flight

engineers are employed and used on all four-engine and jet aircraft landing and taking off in North Carolina. None of the flight engineers are based in North Carolina although they fly in and out of the various airports on schedules of four-motored piston driven planes and all jet planes serving North Carolina. The flight engineers perform services at each of the company's facilities in North Carolina and elsewhere throughout its entire system. When the four-engine piston driven planes and jet planes land at the North Carolina airports, the flight engineers inspect the planes for safety, airworthiness and determine the distribution of gasoline.

"6. Approximately thirty-five per cent of the planes used by the employer in its system are two-engine aircraft and on all the two-engine aircraft the services of flight engineers are not used. Approximately sixty-five per cent of the planes used by the employer in its system consist of four-engine piston planes and jets, all of which utilize the services of flight engineers.

"7. On June 23, 1962, the five hundred and seventy-five flight engineers went on strike and refused to carry out their work assignments. This strike and refusal to work was in protest of the failure of the employer and the bargaining agent representing the flight engineers to reach an agreement as to the qualifications of the flight engineers, there being a difference of opinion between such parties as to whether the flight engineers should also be qualified as pilots. Beginning on June 23, 1962, and continuing through the date of the hearing by the Special Appeals Deputy on July 12, 1962, the flight engineers

failed and refused to perform their services in bringing planes in and out of the facilities of the employer in North Carolina, and elsewhere.

"8. In consequence of the strike of the flight engineers, the employer cancelled all flights and furloughed several thousand employees, including its employees in North Carolina, a list of which is hereto attached and marked 'Exhibit A.' Those individuals whose names on 'Exhibit A' hereto attached were unemployed beginning June 24, 1962, through July 12, 1962, the date of the hearing before the Special Appeals Deputy, and their unemployment is due to the dispute or controversy in existence between the flight engineers and the employer; that the controversy between the flight engineers and the employer was still in existence as of the date of the hearing before the Special Appeals Deputy on July 12, 1962. * * *"

"From the findings of fact . . . it is concluded that a labor dispute was in active progress between Eastern Air Lines, Inc., and the flight engineers on June 23, 1962, at the time of the strike or walkout of the flight engineers, and that such labor dispute was still in active progress as of July 12, 1962." The Commission, by Decision No. 3301, denied the claims upon the ground that G. S. 96-14 (4) disqualified the laid-off employees for insurance benefits. Upon appeal and after hearing, the Superior Court entered the following order:

"AND THE COURT being of the opinion that the Employment Security Commission is in error in finding and concluding that the claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G. S. 96-14 (4) upon

the facts and circumstances revealed by the evidence in the record, and that its decision is therefore in error and should be set aside; AND THE COURT being of the further opinion that if, upon the record before the Commission, the provisions of G. S. 96-14 (4) should be construed as imposing a disqualification upon the appealing claimants who are otherwise eligible for unemployment benefits, then the provisions of G. S. 96-14 (4), as so applied under the facts and circumstances of this case established by the record herein, constitute an unlawful discrimination against these claimants in violation of rights guaranteed to them by the Statutes and Constitution of the United States and by the Constitution of the State of North Carolina.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that Decision No. 3301 rendered by the Employment Security Commission of North Carolina on August 31, 1962, be an the same is hereby reversed and set aside."

The Employment Security Commission of North Carolina appealed.

W. D. Holoman, R. B. Billings, D. G. Ball, for the Employment Security Commission of North Carolina, appellant

Gambrell, Harlan, Russell, Moye & Richardson,

By: E. Smythe Gambrell, William G. Bell, Jr., Harold N. Hill, Jr., Sidney F. Wheeler, for Eastern Air Lines, Inc., appellee

Blakeney, Alexander & Machen,

By: Bailey Patrick, Jr., for North Carolina Employees of Eastern Air Lines, Inc., except the 123 Captains and Air Line Pilots based in North Carolina, appellees

Warren C. Stack,

By: James L. Cole, for Charlotte Council, Air Line Pilots Association, Eastern Air Lines, Inc., appellees

Joyner & Howison,

By: William T. Joyner, for Harriet Cotton Mills and Henderson Cotton Mills, *amicus curiae*

HIGGINS, J.

Here for review is the Superior Court judgment that the Employment Security Commission committed error (1) "In finding and concluding that claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G. S. 96-14 (4) upon the facts and circumstances revealed by the evidence in the record, . . ." and (2) If the 1961 amendment should be construed as a disqualification, then it constitutes an unlawful discrimination in violation of the State and Federal Constitution. From this judgment the Commission appealed. The right to appeal is given by G. S. 96-15.

In their appeal to the Superior Court from the Commission, the claimants, by exceptions, challenged the sufficiency of the evidence to support the Commission's findings of fact. The trial court did not pass on these exceptions. It seems from the wording of the judgment the court did not attempt to set aside any of the findings. However, to eliminate any uncertainty in this respect, we have reviewed all the evidence and conclude that it furnishes support for the Commission's findings of fact.

Findings, supported by competent evidence, are conclusive on appeal. Employment Security Commission v. Freight Lines, 248 N. C. 496, 103 SE 2d 829; In Re Stutts, 245 N. C. 405, 95 SE 2d 919; Employment Security Commission v. Simpson, 238 N. C. 296, 77 SE 2d 718; G. S. 96-15(i). The pivotal question, therefore, is whether the claimants are disqualified by the 1961 amendment to G. S. 96-14.

In the judicial process of construing legislation the courts take a long look at the purposes to be accomplished. The Congress, using the English Act of 1911 as a pattern, passed the Federal Social Security Act on August 14, 1935. One of its major purposes was to give aid, to be administered through State agencies, to those out of work through no fault of their own. To be eligible for Federal contributions, a State agency was required to levy an unemployment compensation tax on employers to supplement the Federal contribution. In its extra session in 1936 the North Carolina General Assembly enacted its Unemployment Compensation Law to take advantage of the Federal grant. One of its major purposes was to provide a fund by systematic accumulations during periods of employment to be retained and used for the benefit of persons furloughed from their jobs through no fault of their own.

Both the State and Federal Acts were passed at a time when the country appeared to be in the initial stages of recovery from a disastrous depression. The lessons learned in the early thirties were both fresh and poignant. The intent was to accumulate, by Federal grant and by an employer's tax, an insurance fund which in a time of need would tide over workers temporarily laid off because work was not available. Employers in all probability did not contemplate their tax money

would be used to encourage any work stoppage resulting from a labor dispute. In discussing this background, the Nebraska Law Review, Vol. 37, No. 4, of June, 1958, contained the following:

> "(1) It was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer, and working injury upon the national economy and upon the public at large; (2) because there had been no previous experience, it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to 'fluctuations in trade.' "

It is doubtful whether in 1935-36 legislators—Federal or State—had in contemplation a time when a few specialists out on strike could force a shutdown of a flourishing business employing nearly 18,000 persons in 26 States, the District of Columbia, Canada, Mexico and Puerto Rico. Neither was it contemplated that the insurance fund could be depleted by workers who were not actually participating in the strike but who were out of work because of it. The depletion of the insurance fund required further employer taxes.

As the years passed the original objects lost some of their clear outlines. Rules and regulations were relaxed permitting depletion of the fund for purposes not

in contemplation when provision was made for it. However, in North Carolina the amendment of 1961 reversed the trend. Prior to July 1, 1961, G. S. 96-14 provided:

> "An individual shall be disqualified for benefits . . . (4) For any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Commission that— (a) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and (b) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: Provided, for the purpose of this subdivision (4), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises."

Effective July 1, 1961, the General Assembly, by Chapter 454, Session Laws of 1961, struck out all of Section 4 above quoted and substituted the following:

> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit."

The effect of the amendment was to eliminate from Section 4 the means therein provided by which an employee might escape disqualification. Likewise, the amendment removed the provision that separate branches of work commonly conducted in separate premises or in separate departments of the same premises shall be deemed to be separate factories, establishments, or other premises. Instead the amendment extended the disqualification if the unemployment is caused by labor dispute in progress at the factory at which the worker was employed or at another place, either within or without this State, if owned or operated by the same employing unit and which supplies materials or services necessary to continue the operation where he was employed.

In this case planes carrying practically two-thirds of Eastern Air Lines' transportation business were grounded because flight engineers refused to operate or to service the planes. Only two-motor craft could operate without the flight engineers. These small planes were engaged in feeder operations on short flights. The heart of Eastern's business was the four-motor and jet planes. As a result of the labor dispute between Eastern and its flight engineers, Eastern was forced to shut down its operations and to close its terminals in North Carolina where claimants had been at work. So far as the results are concerned, it was immaterial where the flight engineers lived, or where their flights originated. When they left the planes, transportation stopped. Eastern's employees at the terminals in North Carolina were furloughed because Eastern was forced out of business by the strike.

Without force is the argument that flight engineers were not based in North Carolina and hence the terminals in this State constituted other plants, factories, establishments, and premises of the employing unit. It must be remembered that new Section 4, in effect at the time the work stopped, extends the disqualification to workers at a factory, establishment, or other premise which supplies necessary materials or services to the plant where the claimants were last employed. The striking flight engineers refused to help man the planes to or from the terminals in North Carolina. This failure to perform this service caused the shutdown at the terminals where claimants were employed.

The many cases cited by the Air Line Pilots Association are not in point. Their brief states: "Since no statute has been found in any jurisdiction written in

the discriminatory language of G. S. 96-14 (4), as amended, all cases reviewed reveal situations arising under Unemployment Security Acts which are similar to the North Carolina Unemployment Security Act prior to 1961." The Commission was bound by the disqualifying terms of the 1961 amendment. Its duty was to protect the integrity of the insurance fund and to be neutral between the management and the workers.

The disqualification resulted from the labor dispute between the flight engineers and Eastern. All flight engineers in the system were out on strike. Their duties were so integrated into Eastern's entire operation that the big planes were grounded because of their refusal to work. Cameron v. DeBoard, 230 Or. 411, 370 P. 2d 709; Depaoli v. Ernst, 73 Nev. 79, 309 P. 2d 363; Adamski v. State, Bureau of Unemployment Comp., 108 Ohio App. 198, 161 NE 2d 907; Spielmann v. Industrial Commission, 236 Wis. 240, 295 NW 1; Ford Motor Co. v. Abercrombie 207 Ga. 464, 62 SE 209; Park v. Appeal Board of Michigan Employ. Sec. Com'n., 355 Mich. 103, 94 NW 2d 407; Magner v. Kinney, 141 Neb. 122, 2 NW 2d 689.

The cases here discussed, and many more therein cited, would seem sufficient to convince all but the highly skeptical that in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. ed. 1167; In re Stevenson, 237

N. C. 528, 75 SE 2d 520; Employment Security Com. v. Jarrell, 231 N. C. 381, 57 SE 2d 403; In re Steelman, 219 N. C. 306, 13 SE 2d 544. "Legislative bodies may distinguish, select, and classify objects of legislation. . . . They may prescribe different regulations for different classes. . . . The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination." State v. Trantham , 230 N. C. 641, 55 SE 2d 198; see also, Bickett v. Tax Commission, 177 N. C. 433, 99 SE 415; Magion v. Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037; City of Springfield v. Smith, 322 Mo. 1129, 19 SW 2d 1; Unemployment Compensation Com. v. Willis, 219 N. C. 709, 15 SE 2d 4; Steward Machine Co. v. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. ed. 1279. The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualification contained in the 1961 amendment involves a question of degree and not of principle.

For the reasons here stated, we hold the judgment of the Superior Court of Mecklenburg County was erroneous and must be

Reversed.

Rodman, J., took no part in the consideration and decision of this case.

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE
SUPERIOR COURT
26TH JUDICIAL DISTRICT

In the Matter of:
J. K. ABERNATHY
SS No. 244-42-7854
Employee, et al.
and
EASTERN AIR LINES, INCORPORATED
Employer
and
EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Judgment

This cause, coming on to be heard and being heard before the undersigned Judge Presiding over the October 22, 1962, Special B Civil Term of Mecklenburg County Superior Court upon appeals from a decision of the Employment Security Commission of North Carolina rendered on August 31, 1962, entitled "In The Matter Of: J. K. Abernathy, SS No. 224-42-7854, Employee, et al, and Eastern Air Lines, Incorporated, Employer," Denision No. 3301, pursuant to Notice of Appeal filed on September 4, 1962, in behalf of the employee-claimants who are members of the Charlotte Council of the Air Line Pilots Association and Notice of Appeal filed on September 7, 1962, in behalf of all other employee-claimants covered by Decision No. 3301, Formal State-

ment of Grounds of Appeal having been filed on September 6, 1962, in behalf of the claimants who are members of the Charlotte Council of the Air Line Pilots Association, and Statement of Grounds for Review and Exceptions to the Commission's Decision having been filed on September 15, 1962, in behalf of all other employee-claimants covered by Decision No. 3301, all in accordance with the provisions of North Carolina General Statutes Section 96-15, Subparagraph (i);

AND THE COURT having heard argument of counsel for each of the above described categories of claimants and argument of General Counsel for the Employment Security Commission, and having considered the entire record as returned to this Court pursuant to the requirements of the above mentioned Section of the General Statutes, and being otherwise fully advised as to all manners pertinent to said appeal;

AND THE COURT being of the opinion that the Employment Security Commission is in error in finding and concluding that the claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G. S. 96-14(4) upon the facts and circumstances revealed by the evidence in the record, and that its decision is therefore in error and should be set aside; AND THE COURT being of the further opinion that if, upon the record before the Commission, the provisions of G. S. 96-14(4) should be construed as imposing a disqualification upon the appealing claimants who are otherwise eligible for unemployment benefits, then the provisions of G. S. 96-14(4), as so applied under the facts and circumstances of this case established by the record herein, constitute an unlawful discrimination against these claimants in violation of rights guaranteed

to them by the Statutes and Constitution of the United States and by the Constitution of the State of North Carolina.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that Decision No. 3301 rendered by the Employment Security Commission of North Carolina on August 31, 1962, be and the same is hereby reversed and set aside.

THIS THE 25TH DAY OF OCTOBER, 1962.

/s/ H. L. RIDDLE, JR.

Judge Presiding